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In The

Supreme Court of the United States

October Term, 1996

THE DAILY NEWS OF LOS ANGELES, A DIVISION OF COOKE MEDIA GROUP, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF OF PETITIONER

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INTRODUCTION

In its brief in opposition, Respondent The National Labor Relations Board (the "Board") carefully avoids addressing the central issue raised in Petitioner The Daily News of Los Angeles, a Division of Cooke Media Group, Inc.'s (the "Daily News") Petition for Writ of Certiorari, namely whether wage increases given or withheld in amounts which the Board itself found to be "totally discretionary" can logically be held to be an established condition of employment under this Court's decision in *NLRB v. Katz*, 369 U.S. 736 (1964), where *Katz* specifically held that such discretionary increases are not an established condition of employment. 88a.

The Daily News also seeks review on the basis that the court of appeals' decision impermissibly forces concessions on a bargainable issue. The Board's brief in opposition mistakenly asserts that the Daily News failed to raise this issue to the court of appeals, and misrepresents to the Court that the Daily News has raised this issue for the first time in its petition. In fact, the issue was squarely raised to the court of appeals in the opening brief the Daily News filed with that court.[1]

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[1] Appended hereto, beginning at appendix page 1aa, are excerpts from the opening brief filed with the court of appeals wherein this issue was addressed to that court.

ARGUMENT

I. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH KATZ'S HOLDING THAT DISCRETIONARY INCREASES ARE NOT AN ESTABLISHED CONDITION OF EMPLOYMENT.

The Board's opposition attempts to minimize the fundamental inconsistency of the court of appeals' decision with *Katz* by arguing that "the alleged conflict with *Katz* thus depends upon a factual characterization of the wage increase (as entirely discretionary) that the administrative law judge, the Board, and the court of appeals each rejected," and concluding that a writ of certiorari is "not warranted" simply to review a finding of fact. (Opp. Brief, page 9.) This is a misstatement of the case, as there is no factual dispute as to the degree of discretion exercised by the Daily News over the amounts of the increases. Rather, the degree of discretion exercised by the employer here is undisputed and indistinguishable from that exercised by the employer in *Katz* itself. The uncontested finding of the Administrative Law Judge here, in contrast to the characterization contained in the Board's brief, is as follows:

> The resulting salary increase, if any, is based on merit, and may range from no increase to a substantial increase depending upon the perceived efforts and ability of the employee, and his or her value to the newspaper. *The amount of the increase, if any, is totally discretionary*. 88a (emphasis provided).

This finding that the amount of the increase, if any, was "totally discretionary" was not contested by the Board, and may not now be placed in issue by misrepresenting

the facts and the Administrative Law Judge's findings in their brief.[2]

In contrast to the assertion in its present brief, the Board itself found that the increases, if any, were "totally discretionary" in amount. The sole element over which there is any factual dispute is whether the timing of the increases was fixed, an element which is inconsequential to the legal issue raised by the Daily News's petition. *Katz* itself rejected the argument advanced by the employer that the regular timing of the increases, the Company's "long-standing practice of granting quarterly or semiannual merit reviews" rendered the increases an established condition of employment. 369 U.S. at 746. If regular timing could not render discretionary increases an established condition in *Katz*, they logically may not do so here. *Katz* held that where an employer exercised discretion over the amount of increases, those increases did not constitute an established condition of employment, even if the timing were arguably regular and fixed. *Id.* Indeed, the Board recognizes that "[i]n *Katz*, the merit increases could not be viewed as a term and condition of employment because they were entirely discretionary," but argues that the raises herein "were sufficiently fixed to be viewed as a part of the existing wage structure." (Opp. Brief, pp. 7-8, n.3) What the Board has failed to do, however, is distinguish the raises herein from those at issue in *Katz* on any principled basis. In *Katz*, the Board

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[2] Indeed, the court of appeals in its first decision remanded this matter to the Board for "consideration of whether an employer is bound under *Katz* to persist in a merit raise program that is entirely discretionary as to amount." 71a.

points out that the size of the increases were "entirely discretionary." How does that differ from the undisputed finding of the Administrative Law Judge that "the amount of the increase, if any, is totally discretionary?" 88a. As noted above, *Katz* rejected the argument that the fixed timing of the employer's increases rendered them an established condition of the employer. The Board's argument misses the mark entirely when it asserts that "a single discretionary component, regarding the amount of the wage increase [if any], did not strip it of its status as an established wage program." (Opp. Brief, pp. 8-9.) For it was precisely the employer's discretion over this "component," i.e. the amount of increases, which *Katz* found precluded these increases from being an established wage program. "[T]he raises here were in no sense automatic, but were informed by a large measure of discretion." 746 U.S. at 746. *Katz* held that an employer's exercise of a "large measure" of discretion over the amount of the increases precluded the employer from arguing that their continuation was necessary to continue the status quo. This "large measure" of discretion exercised in *Katz* is not appreciably different from the "totally discretionary" raises at issue here.

The issue is not whether a unilateral change can occur by granting or by failing to grant increases as the Board suggests, but whether the status quo conditions of employment are preserved or altered by the continued granting of discretionary increases. In *Katz*, this Court held that the status quo was altered by the employer's granting of discretionary increases. The court of appeals below holds precisely the contrary, that discretionary increase must be granted (if the union demands it) in

order to maintain the status quo. Under the court of appeals' decision, the employer's duty to maintain existing conditions of employment is defined by the union's bargaining demand, not the discretion exercised by the employer. Certiorari should be granted to give the Court the opportunity to hear further argument and correct the erroneous application of *Katz* below.

II. THE DECISION OF THE COURT OF APPEALS BELOW CONFLICTS WITH THOSE OF OTHER CIRCUITS ON THIS ISSUE.

The Board's brief suggests that the courts of appeals have reached uniform results on similar cases. Unlike the court of appeals below, the Board actually cites to the Tenth Circuit's decision in *Phelps Dodge Mining Co. v. NLRB*, 22 F.3d 1493 (10th Cir. 1994), but attempts to distinguish it on a factual basis. *Phelps*, however, remains antithetical to the court's decision below. *Phelps* specifically notes that "[p]ayments to employees which are fixed as to timing but discretionary in amount do not become part of the employees' reasonable expectations and thus are not considered 'terms and conditions' of employment," a result directly contrary to that reached here. 22 F.3d at 1496.

The Board's attempt to distinguish *NLRB v. Nello Pistoresi & Son, Inc.*, 500 F.2d 399 (9th Cir. 1974), on the basis that discretionary bonuses, rather than raises, were at issue is uncompelling, since the engine of analysis for both bonuses and increases is *Katz*, which focuses on the exercise of discretion, not the form of compensation. 500

F.2d at 400-01. Similarly, the Board's attempt to distinguish *Roper Corp. v. NLRB*, 712 F.2d 306 (7th Cir. 1983), and *NLRB v. Rochester Inst. of Technology*, 724 F.2d 9, 12 (2nd Cir. 1983) is also unconvincing. The Board argues that in these two cases "the employers fulfilled their obligation to bargain before discontinuing [discretionary] merit increases." (Opp. Brief, pp. 9-10, n.6.) Yet in neither case did the employer reach agreement or impasse, a condition the Board expressly imposes here, and the Board makes no effort to explain the difference, if any, between the level of bargaining by the Daily News here, which was fairly extensive, and the bargaining in those two cases.[3]

III. THE BOARD'S IMPERMISSIBLE FORCING OF BARGAINING CONCESSIONS UPON THE DAILY NEWS WAS RAISED BEFORE THE COURT OF APPEALS BELOW.

The Board argues that there is "no merit" to the Daily News's argument that the court of appeals' decision forces bargaining concessions upon it, misrepresenting to this Court that "petitioner did not raise that argument below." (Opp. Brief, p. 10.) In fact, the issue was addressed directly to the court of appeals below.

One of the seven "Issues Presented" to the court of appeals in the Daily News's opening brief was:

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[3] The Daily News raised the issue during at least two bargaining sessions, and engaged in fairly extensive discussions. These negotiations are recounted in the Administrative Law Judge's opinion. 88a-90a.

> Whether the National Labor Relations Board's supplemental decision and order would impermissibly intrude on the employer's legitimate economic weapons, by forcing economic concessions on discretionary and bargainable increases, in a manner inconsistent with the National Labor Relations Act and Supreme Court precedent? 3aa.[4]

An argument heading in that same brief was captioned "The Board's Proposed Remedy is Inconsistent with Katz, and Would Force Economic Concessions by the Employer." 3aa. Therein, the Daily News argued, "[t]he Board's remedy . . . would simply implement the Guild's bargaining demand. . . . The Board does not have the power to impose substantive terms on the parties: 'it is equally clear that the Board may not, either directly or indirectly, compel concessions' upon parties to collective bargaining," citing *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952). 5aa. For the Board to now represent to this Court that the Daily News did not raise this issue before the court of appeals is preposterous.

Although the issue was raised by the Daily News, the court of appeals failed to address it, as the Board's brief acknowledges. The court of appeals' failure to address this important issue makes the granting of this petition even more urgent. The Board's attempt to address this issue in its brief is wholly inadequate.

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[4] The Daily News' Opening Brief to the court of appeals is included in the supplemental appendix hereto, beginning at page 1aa.

The Board argues that because the Daily News could subsequently bargain to impasse, and then terminate merit increases, no concession has been forced. This, of course, could be said of any substantive term which the Board might choose to impose, were that power not expressly forbidden.[5] The Board does not dispute that under the present ruling, a union can either demand that increases be continued, or can insist that they be discontinued under *Katz*. The Board does not dispute that the present decision compels an employer to implement that bargaining demand. *Katz* held that discretionary increases are **not** a part of the status quo, but rather are bargainable issues. Consistent with that holding, a union is given the right to choose its bargaining demand regarding the subject of discretionary increases, and yet the present decision, when coupled with *Katz*, forces the employer to agree to whichever demand the union makes.[6] The fact that an employer can subsequently try, through bargaining, to take back the concession compelled by the Board does not alter the fact that a concession has been forced in the first instance.

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[5] For example, if the Board imposed a 50% wage increase, the employer would have the right to bargain to impasse, then eventually implement a corresponding wage cut. The Board's argument that no concession has been forced is absurd. Moreover, reaching impasse can be a long and tedious process. Here, the parties bargained for 18 months without reaching impasse.

[6] The fact that, under the court of appeals' decision, the union's demand to continue or discontinue increases defines the employer's obligation under *Katz* to maintain the status quo only underscores the fundamental contradictions underlying the court of appeals' decision.

CONCLUSION

The decision of the court of appeals conflicts with this Court's own decisions, and the decisions of other courts of appeals. The Petition for Writ of Certiorari should therefore be granted.

Respectfully submitted,

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Excerpts from the Opening Brief of the Daily News of Los Angeles to the Court of Appeals Below

Oral Argument: November 6, 1995

NO. 95-1047

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE DAILY NEWS OF LOS ANGELES,
A DIVISION OF COOKE MEDIA GROUP, INC.,

Petitioner/Cross-Respondent,

V.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner,

and

LOS ANGELES NEWSPAPER GUILD,
LOCAL 69, AFL-CIO,

Intervenor.

PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

OPENING BRIEF OF PETITIONER/ CROSS-RESPONDENT THE DAILY NEWS OF LOS ANGELES

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* * *

II. ISSUES PRESENTED.

* * *

4. Whether the National Labor Relations Board's supplemental decision and order would impermissibly intrude on the employer's legitimate economic weapons, by forcing economic concessions on discretionary and bargainable increases, in a manner inconsistent with the National Labor Relations Act and Supreme Court precedent?

* * *

F. THE BOARD'S DECISION IS BASED ON AN ERRONEOUS VIEW OF THE LAW, AND IS INCOMPATIBLE WITH THE NLRA.

1. The Board's Proposed Remedy is Inconsistent With Katz, and Would Force Economic Concessions By the Employer.

In remanding this matter, the Court asked the Board to "address the consistency of the remedy (if any) with the reasoning of *Katz*." 979 F.2d at 1578. *Katz* held that

where past increases "were informed by a large measure of discretion," there "is simply no way . . . for a union to know whether or not there has been a substantial departure from past practice" when increases are given. 369 U.S. at 746. Because past increases here were "totally discretionary" in nature, the Court reasoned that the Board's proposed remedy to pay employees "the difference between their actual wages and the wages they would have received" was impossible since under *Katz*, "the latter by hypothesis are unascertainable." *Daily News*, 979 F.2d at 1577.

Under the Employer's policy, an individual's increase "may range from no increase to a substantial increase," and the "amount of the increase, if any, is totally discretionary." (PA: 76.) Given this degree of discretion, the proposed remedy is unworkable, as there is no way to determine what wages employees "would have received." As the dissent in *DNLA I* noted, "Indeed, if the Respondent exercised its discretion not to grant increases," then the Guild's alleged waiver "would seem to require dismissal of the 8(a)(5) allegation." 304 N.L.R.B. at 513 (Oviatt, dissenting).

The Board's response to the serious questions which the Court and one of its previous members raised over the viability of the remedy is to dismiss them as mere "pessimism." 315 N.L.R.B. at 1241. The Board proposes to examine "the amounts of the merit increases awarded to the editorial employees during the years prior to their discontinuance" and use them "to construct a formula" for subsequent raises. *Id.*

The Board's remedy would eviscerate the central feature of the program, which was the wholly discretionary nature of the raises. Raises, if given at all, varied widely between years and between individuals, and did not conform to performance ratings. (PA: 180, 312-313, 333-335.) There is no "formula" which can approximate increases since they were discretionary. The Board's remedy, rather than preserve the status quo, would simply implement the Guild's bargaining demand that raises be non-discretionary: "if currently an employee gets four percent, they should not get one percent." (PA: 225.) The Board does not have the power to impose substantive terms on the parties: "it is equally clear that the Board may not, either directly or indirectly, compel concessions" upon parties to collective bargaining. *N.L.R.B. v. American Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952). Because the Board's remedy would compel concession to the Guild's demand, its order cannot be enforced.

* * *